UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

PBR NJ, INC. Employer and	Case 4–RC–19603
METROPOLITAN REGIONAL COUNCIL OF PHILADELPHIA & VICINITY, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL–CIO[1] Petitioner	

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer, a carpentry contractor with a shop and principal offices located in Westville, New Jersey, is engaged in business as a commercial construction subcontractor performing such work as tenant fit-out; putting up metal stud frames, drywall, and acoustical ceiling tile; minor demolition and masonry. In addition, the Employer performs residential work and works as a general contractor on commercial construction jobs. The parties agree with respect to the appropriateness of the unit but disagree as to its composition. The parties agree that the appropriate unit consists of the Employer's approximately 18 to 20 full-time and regular part-time carpenters, carpenter helpers/apprentices and working foremen.[2] They disagree, however, as to the status of: **Steven Massey, Samuel Stewart, Gregory Stewart, Nicholas DiBiase III, John Pinto, Glen Buckley,** and **Jerry Defazio**. The Employer, contrary to the Petitioner, contends that Steven Massey and Gregory Stewart are independent contractors performing work for the Employer on a temporary basis and that Samuel Stewart, Nicholas DiBiase III, John Pinto,

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[1] The Petitioner's name appears as amended at the hearing.

[2] Collectively called "carpenters" herein.

Glen Buckley and Jerry Defazio are employed by Massey and Stewart and not by the Employer. Alternatively, the Employer contends if the Board finds that these individuals are not independent contractors, Samuel Stewart, DiBiase, Pinto, Buckley and Defazio are casual or temporary employees with no reasonable expectation of continued employment, and that Massey and G. Stewart are supervisors within the meaning of Section 2(11) of the Act. Finally, the Employer contends that the seven individuals do not share a community of interest with employees in the agreed-upon unit.

The approximately 18 to 20 employees in the agreed-upon unit perform carpentry work, including labor, cleanup, sweeping, demolition, metal studs, drywall, and finish millwork. They also perform drywall taping and spackling work on smaller projects. These employees earn between $8 per hour for work as laborers and $25 per hour for foremen who perform skilled carpentry work. Regular payroll deductions are taken from the checks of these employees, and they are paid out of the Employer's payroll account. They receive five paid holidays per year, overtime, legal holidays, free T–shirts and are eligible to participate in the Employer's health insurance plan. The Employer interviewed and hired these employees as regular employees and has W-4 forms for each of them. Their regular work schedule is 7:00 a.m. to 3:30 p.m., Monday through Friday. They work under one of about six different working foremen and they report to Employer President Richard Crean. They use their own basic tools, drive their own vehicles and wear their own clothing. The Employer does not require that they be certified or licensed. They need the Employer's approval to take sick days or vacations and, if they exhibit a pattern of missing work without explanation, they are subject to discharge.

The Employer was very busy during the summer of 1998 and was unable to perform all of its work with its regular complement of employees. As a result, the Employer sought additional help through newspaper ads and hired a few of the unit employees who applied for work in response to the ads. Gregory Stewart and Steven Massey applied for work at one of the Employer's jobsites and were hired by the Employer to hang drywall on a piecework basis. They were hired for a job in Wildwood, New Jersey, known as Marlan Leasing, and for a job at a mortgage company, also in New Jersey, and were to receive approximately $6 per board to be paid out of the Employer's general account. G. Stewart and Massey were permitted to use helpers to assist them in hanging the drywall without obtaining the Employer's approval. Checks were written either to G. Stewart or Massey, based on a count of boards they and their helpers hung, and it was up to G. Stewart or Massey to divide the money among themselves and their helpers. No taxes or other deductions were taken from these checks.

According to G. Stewart, Nicholas DiBiase III and John Pinto worked with Stewart and Massey at their request on both the Marlan Leasing job and the mortgage company job. They generally worked on these projects on weekends and nights after the Employer's regular employees finished working for the day. G. Stewart, DiBiase, Pinto and Massey were regularly employed during the day by another company. G. Stewart testified that on the mortgage company project, there was a dispute between him and the Employer as to the count of boards and how some of the boards were hung. According to Employer President Crean, the Employer did not agree with the board count and had to rehang some boards with his regular employees. As a result, the Employer offered, and Stewart and Massey accepted, $5 per board.

G. Stewart and Massey also worked for the Employer for about one week in the fall of 1998 at a project known as the "Flying J" in Carneys Point, New Jersey. On this job, Massey negotiated a daily rate for himself and Stewart. They were paid from the Employer's general account and worked 7:00 a.m. to 3:30 p.m.. The Employer's working foreman on the job told Massey and Stewart what work they would be doing on the project. Stewart testified that he was unaware of anybody reviewing their work on that job.

After finishing some exterior work on the Flying J, the working foreman on the job told Massey and G. Stewart that the Employer no longer needed them on that job and that they should instead go to Doylestown, Pennsylvania where the Employer was constructing a movie theater. Massey and Stewart were working on the Doylestown theatre project on January 29, 1999, the date of the hearing.

G. Stewart and Massey were paid a daily rate for the Doylestown theatre project. The record shows that Stewart's daily rate was equivalent to $17.50 per hour, but does not reflect Massey's daily rate. Although Stewart and Massey initially worked the same hours as the agreed-upon unit employees, i.e., 7:00 a.m. to 3:30 p.m., they later began to work 10 hr. days and weekends. Unlike the agreed-upon unit employees who have one week's wages withheld from their pay, Stewart and Massey were paid every Friday after they called their hours in to the Employer.

Stewart and Massey worked alongside unit employees and reported to the Employer's working foremen on the job, who directed them where to work at the jobsite and the sequence of what was to be done. If problems occurred on the jobsite, the working foremen were instructed to call Employer President Crean.

At the request of the working foremen, G. Stewart and Massey brought other individuals who wished to work at one of the Employer's Doylestown jobsite. These individuals were **Glen Buckley, Samuel Stewart, Nicholas DiBiase III, John Pinto**, and **Jerry Defazio**. Stewart and Massey provided them with transportation to and from the Doylestown jobsite.

The Employer never received employment applications from any of the seven disputed individuals, never interviewed any of them, and, except for Stewart and Massey, has no telephone numbers or addresses for them. Massey negotiated the daily rates for himself and G. Stewart as well as the rates for the five other disputed individuals. The hourly rates were in the $15 dollar range. Massey also negotiated other terms of employment. Thus, their checks would not be held for a week, no deductions would be withheld from their wages, they would receive no benefits and no mileage or gasoline allowances. They were paid out of the Employer's general account. According to Employer President Crean, G. Stewart and Massey asked that each of the seven individuals be paid by separate checks.

The working foreman on the Doylestown theater job reviewed the work of the seven disputed individuals, and told them if they did not perform on the job, they would be asked to leave. The record shows that G. Stewart was told that DiBiase, Pinto and Beckley had been or would be fired if they did not show up for work. According to Employer President Crean, the seven disputed individuals missed work without any consequences. These individuals were not required to work overtime.

According to Crean, in late January 1999, the working foreman on the Doylestown theatre job was told to lay off some people because the job was winding down. G. Stewart testified that he assumed that the Employer was happy with their work and that they would be asked to go to the next job with the Employer. Employer President Crean testified that he had an understanding with Massey and Stewart that they would work on the theater job as long as they were needed. Crean further testified that, as of Monday, February 1, 1999, the Employer would have no further work for the seven disputed individuals and that there were no other current jobs on which the Employer needed additional labor Crean testified that he would use the disputed individuals again in the future as pieceworkers if he did not have enough regular employees to complete a job.

Under Section 2(3) of the Act, the term "employee" shall not include "any individual having the status of an independent contractor." Over 30 years ago, the Supreme Court, agreeing with the Board that "debit agents" of an insurance company were employees, held that the "common-law agency test" must be applied to determine whether the agents were independent contractors or employees. *NLRB v. United Insurance Co.*, 390 U.S. 254, 256, 67 LRRM 2649, 2650 (1968). "[T]here is no short-hand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles." Id. at 258, 67 LRRM at 2651.

Recently, the Board emphasized that this original "common-law agency test" rather than what came to be known as a "right to control test" must be used to determine employee status, even though criteria in a "right-to-control" test are part of the common-law agency analysis. *Dial–A–Mattress Operating Corp*., 326 NLRB No. 75, slip op. at 6–7 (August 27, 1998); *Roadway Package System*, 326 NLRB No. 72, slip op. at 7–9, 11 fn. 37 (August 27, 1998). In *Dial–A–Mattress*, the Board applied the common-law agency test and examined the following factors: the identities of the alleged independent contractors and their relationship with the employer, contracts between the alleged independent contractors and the employer, duties and equipment used by the alleged independent contractors in performing the work for the Employer, compensation and work schedules for the disputed individuals, the use of assistants, employer rules, personnel policies, and discipline of the alleged independent contractors, and entrepreneurial activities engaged in by the alleged independent contractors. 326 NLRB No. 75, slip op. at 1–6. Two additional relevant factors are how the work in question is performed "'in the locality'" and "'[w]hether or not the parties believe they are creating the relation of master and servant.'" *Roadway*, supra, 326 NLRB No. 72, slip op. at 8 fn. 32.

In *Dial–A–Mattress*, the Board concluded that the mattress deliverers were independent contractors for the following reasons: they could make an entrepreneurial profit beyond a return on their labor and capital investment, they hired and trained their own employees and had sole control and responsibility over them, they selected, acquired, owned, financed, inspected and maintained their own vehicles, they received no minimum guaranteed compensation, they could decline orders without penalty and were not required to work every day for the employer, they maintained their own identities often using their own corporate names, with their own business accounts, business tax identification numbers and insurance; they were held out as independent contractors to the public by the employer, they had written contracts with the employer which provided, inter alia, that they had exclusive control over their own employees, they were not subject to the employer's work rules, they were required to have liability insurance and indemnify the employer for losses; and they expressed a clear intention to form an independent contractor relationship with the employer. *Dial–A–Mattress*, supra, 326 NLRB No. 75.

In *Roadway*, the Board applied the same common-law agency test and determined that pick-up and delivery drivers were employees within the meaning of the Act, relying on such factors as drivers not being able to refuse to accept merchandise for pickups and delivery in their primary service area; drivers having contractual requirements of being available for work for the employer nearly every day, and thus, making outside work opportunities practically impossible; drivers having to wear a Roadway uniform; drivers having to input data into Roadway computers; drivers being given specific assistance in procuring only certain Roadway-approved vehicles for their work; drivers receiving a business support package and other financial assistance from the employer, including loans and group insurance; and drivers having limited, if any, real entrepreneurial opportunities. *Roadway*, supra, 326 NLRB No. 72.

In this case, which arises in the construction industry, I have applied the common law agency test set forth above in *Dial–A–Mattress* and *Roadway* and find that the record evidence supports the conclusions that the seven disputed individuals are employees within the meaning of the Act and not independent contractors, and that they share a community of interest with the undisputed bargaining unit employees. Facts which I rely on in reaching these conclusions are that the seven disputed individuals were hired by the Employer to perform the same work of hanging drywall as performed by the Employer's admitted unit employees; they perform work for the Employer as long as they are needed on a given job with the understanding that they may be called to work on subsequent jobs as needed by the Employer, as long as they continue to perform to the Employer's satisfaction; they use the same type of tools and equipment as admitted unit employees in performing work for the Employer; they have worked most recently alongside unit employees during the same core hours, under the direction of the Employer's working foreman who has informed them that if they do not perform on the job or show up for work they will be fired; their pay on an hourly basis is within the range of hourly wages paid to admitted unit employees; each of the seven disputed individuals is currently being paid directly by the Employer by check; the Employer and the seven disputed individuals do not have any contracts among them manifesting a clear intention to create an independent contractor relationship; and the seven disputed individuals, who are paid flat rates, have no real entrepreneurial opportunities consistent with independent contractor status.

With respect to the Employer's contention that Massey and G. Stewart are supervisors within the meaning of Section 2(11) of the Act because of their role in the hiring of the other five disputed individuals, their negotiation of pay rates for the disputed individuals, and their direction of those individuals on the Employer's jobsites, the burden of establishing supervisory status rests on the party asserting that such status exists. *Bennett Indus*., 313 NLRB 1363 (1994). To establish supervisory status, a party must show that the purported supervisor possesses one or more of the indicia of supervisory authority set forth in Section 2(11) of the Act. *Providence Alaska Medical Center*, 320 NLRB 717, 725 (1996), enfd. 121 F.3d 548, 156 LRRM 2001 (9th Cir. 1997). The Board has stated that the supervisory exemption is not to be construed too broadly because the inevitable consequence would be to remove individuals from the protection of the Act. *Providence Alaska Medical Center*, supra, 320 NLRB at 725. The legislative history of Section 2(11) of the Act makes it clear that Congress considered supervisors who responsibly direct employees to be different from lead employees or straw bosses who merely provide routine direction to other employees as a result of superior training or experience. S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947), reprinted in 1 Legis. Hist. 407, 410 (LMRA 1947). Where evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *The Door*, 297 NLRB 601 fn.5 (1990).

The Board has often found in cases such as this that an alleged supervisor's role in recommending the hiring of assistants or in negotiating their pay, does not constitute supervisory authority in the interest of the employer, where the role played by the employee in such matters is purely in his or her own personal interest to ensure a harmonious relationship between the employee and his or her assistants, and to motivate the helpers to remain in the employ of the Employer. See *Tiberti Fence Co*., 326 NLRB 1 fn. 4 (1998) (and cases cited therein). With respect to G. Stewart and Massey's direction of the remaining disputed individuals on the job, I find insufficient evidence to conclude that they are acting in anything other than a lead person capacity vis-a-vis these individuals. Based on the foregoing, I find that the Employer has not met its burden of establishing that Gregory Stewart and Steve Massey possess any of the indicia of supervisory status set forth in Section 2(11) of the Act, and therefore, I find them to be employees and not supervisors within the meaning of the Act.

With respect to the Employer's contention that the disputed employees are casual or temporary employees with no reasonable expectation of continued employment, I find that in this construction industry context, the relevant inquiry regarding this aspect of their employment status is whether the seven disputed individuals meet the eligibility criteria developed by the Board in *Daniel Construction,* 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967); *Steiny & Co*., 308 NLRB 1323 (1992).[3]

Based on the foregoing, I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time carpenters, carpenter helpers/apprentices, and working foremen employed by the Employer, excluding clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently,[4] subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Additionally eligible are those employees in the unit who have been employed for a total of 30 working days or more within the 12 months preceding the payroll period ending immediately preceding the date of this Decision, or who have had some employment in that period and have been employed for a total of 45 working days within the 24 months immediately preceding the payroll period ending immediately preceding the date of this Decision, and also have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for

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[3] Under the *Daniel* formula, in addition to those eligible to vote under standard criteria (employed and working on the date of the election), employees are eligible to vote if they have been employed by the Employer for 30 days or more within the 12 months preceding the election eligibility date, or if they have had some employment with the Employer in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date. *Daniel Construction*, supra, 133 NLRB at 267; *Steiny & Co.*, supra, 308 NLRB at 1326.

[4] Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

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LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman–Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within **7** days of the date of this Decision **3** copies of an election eligibility list, containing the ***full*** names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be clearly legible, and computer-generated lists should be printed in at least 12-point type. In order to be timely filed, such list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **May 12, 1999**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, NW, Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **May 19, 1999**.

Dated May 5, 1999

at Philadelphia, PA

/s/ Dorothy L. Moore-Duncan
DOROTHY L. MOORE–DUNCAN
Regional Director, Region Four

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